



IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, MAKHANDA]

CASE NO.CA&R 75/2022

In the matter between:

XOLANI MBOYA

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

NORMAN J:

- [1] This is an appeal against sentence. The appellant was convicted on two counts. Count 1, was a charge of robbery with aggravating circumstances and count 2, house breaking with intent to steal and theft. He was sentenced to undergo fifteen (15) years imprisonment in respect of count 1 and five (5) years imprisonment in respect of count 2, and both sentences were to run concurrently.

- [2] He applied for leave to appeal to the trial court which was refused. He then petitioned the Judge President of the Division and leave was accordingly granted against sentence.

Background facts

- [3] In respect of Count 1, the robbery charge, the evidence before the trial court was:

3.1 The complainant, Ms Tsewu, was a domestic worker at the relevant house. On 9 October 2020 she was inside her living quarters and busy on her phone when the appellant entered carrying a panga. He demanded her phone and the R1000 she had next to her. She handed those to him.

3.2. Thereafter the appellant demanded access to the safe and she led him to the main house. The appellant was walking behind her, still carrying the panga. When they were inside the main house the appellant demanded various items before coming to the room where the complainant's child was watching television.

3.3. The child saw the panga and pleaded with the appellant not to kill his mother. The child further stood in front of the TV and claimed it to be his. The alarm went off and the appellant got distracted. The complainant and her son managed to escape. It was at that point that the complainant moved into an enclosed stoep/sun room. The appellant tried to open the door to the stoep and when he could not, he used an ornament to try and break the glass on the door. He did not manage to break the glass and he fled the house with a laptop that was next to the television.

- [4] In respect of count 2, house breaking with intent to steal and theft, the warehouse of the complainant, Ms Mariette Boonzaaier was entered into by the appellant through a broken window. The appellant stole a computer, an Apple watch and an Eskom handheld device.
- [5] It is common cause that most of the items that were stolen were recovered except for the R1000 that belonged to the complainant in count 1 and the Eskom handheld device of the complainant in count 2. The appellant was arrested and detained on the same day.
- [6] Mr Geldenhuys appeared for the appellant and Mr Govender appeared for the Respondent.

Appellant's submissions

- [7] Mr Geldenhuys submitted that the appellant's essential personal circumstances which were communicated by his attorney to the court were that ; he was 26 years old at the time of the sentence; he is unmarried but has three (3) minor children; he has a Grade 9 education; he was employed at a car-wash business at the time he committed the offences relevant to this appeal; he has two relevant previous convictions involving theft; he was incarcerated while awaiting trial for approximately a year and half. As the robbery was accompanied by aggravating circumstances, a minimum sentence of fifteen (15) years imprisonment is prescribed in respect of count 1 which has to be imposed unless there are substantial and compelling circumstances.
- [8] He further submitted that in sentencing the appellant the trial court did not place sufficient emphasis on the following factors:

- 8.1 the appellant's general personal circumstances, although armed with a panga, the appellant did not physically use it on the premises and no physical harm was inflicted on anyone during the incident. The cellphone and the laptop were recovered. He submitted that the trial court erred in not finding that the prescribed sentence is disproportionate to the appellant's personal circumstances, the seriousness of the offence and the interests of the society and therefore unjust.
- 8.2 He further submitted that the trial court erred in finding that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.
- 8.3 He submitted that this court should interfere with the sentence in count 1, by reducing it and ordering the sentences in both counts to run concurrently.
- 8.4. The trial court should have considered the period of one (1) year and five (5) months spent by the appellant in custody whilst awaiting trial. It was submitted that, that factor, should have persuaded the trial court to deviate from the minimum sentence imposed.

Respondent's submissions

[9] Mr Govender, on the other hand, acting on behalf of the respondent opposed the appeal and submitted that:

- 9.1. At the time the appellant was convicted in respect of these charges, he was on parole. He was serving a sentence of six (6) years after he had been convicted of house breaking with intent to steal and theft.

- 9.2 He had been out of prison for six (6) months when he committed the offences. He committed the offence at a time when he was gainfully employed. The trial court had taken into account those aspects in imposing sentence. It further considered, as aggravating factors, the emotional trauma that the complainant and the child suffered.
- 9.3. The trial court correctly found that no substantial and compelling circumstances existed for it to deviate from the prescribed minimum sentence. He further submitted also that the trial court took into account all the circumstances of the case including the traditional factors when sentencing the appellant.
- 9.4. The sentence imposed serves the purposes of punishment, deterrence and protection of the interests of society and that there was no misdirection committed by the trial court in imposing the sentence.
- 9.5. He further relied on *S v PCB*¹ for the submission that the minimum sentences are prescribed by the Criminal Law Amendment Act ,1997 and must therefore be treated differently from other sentences imposed.

Discussion

[10] A court of appeal does not possess unbounded authority to interfere with a sentence imposed by the trial court. It is trite that the test on appeal against sentence is not whether the sentence was right or wrong but whether the trial court exercised its discretion properly and judicially.

¹ 2013 (2) SACR 533 (SCA).

- [11] To disturb the sentence on appeal, the sentence must of such a nature, degree or seriousness that it shows directly or inherently that the court did not exercise its discretion at all or exercise it improperly or unreasonably. (See : *S v PCB*².)
- [12] Having had regard to the judgment on sentence it appears that the trial court, in sentencing the appellant, took into account all the relevant factors. It is necessary to deal with the submission that the trial court should have imposed a lesser sentence because the complainant in count 1 and her son were not physically harmed although the appellant was carrying a panga. That, so it is argued on behalf of the appellant, is a factor which warrants interference with the sentence. I disagree. The panga was used to subdue the complainant and the desired result was achieved by the appellant. The complainant was posing no danger to the appellant. The panga had the effect of traumatizing both the complainant and her son.
- [13] It was used against an unarmed, harmless woman who was sitting in the comfort of her living quarters. He took the property of both complainants with total disregard of the owners' rights to their property. This was carried out by the appellant, a person who had been given a second chance in life, having been released on parole. Instead of embracing that opportunity, he deliberately jeopardized it, in a violent manner.
- [14] The appellant has previous convictions. He was aware of what it means to break the law, to be convicted and to serve a term of imprisonment.

² 2013 (2) SACR 533 (SCA); para 20 *S v Rabie* 1975 (4) SA 855 (A).

[15] In so far as the other ground relating to the period spent in custody prior to conviction and sentence, my view is, this argument, with respect, has no merit. The trial court was asked specifically by the appellant's legal representative, to take that period into account.³

[16] The trial court, in its judgment on sentence, indeed considered that factor.⁴ There is accordingly no room to interfere with the sentence.

[17] I have had regard to the following authorities which demonstrate quite clearly that the various sentences were only interfered with, where it was found that a trial court had not taken the period of incarceration before trial as a fact, when considering an appropriate sentence. Those are:

[18] In *Makhokha v State*⁵, the Constitutional Court stated:

"As indicated, we will not interfere with the 15-year term of imprisonment. But the order must put it beyond question that this term started running from the date of sentence".

[19] In *S v Vilakazi & Others*⁶ Goldstein J held that the period spent by an accused awaiting trial should be taken into account when sentencing. He also suggested that legislation ought to make specific provision for the antedating of a sentence to occur to the extent of any time spent in custody awaiting trial. Pointing out that the exact period of custody cannot merely be deducted from sentences imposed, Goldstein J found that it was unsafe to rely on the Canadian authority in terms of which such time is regarded as a sentence of twice that length.⁷

³ (See: Record page 222 Lines 1 to 5).

⁴ See: Record page 230 Lines 1 to 5)

⁵ [2019] ZACC 19.

⁶ 2000 (1) SACR 140 (W).

⁷ Commentary on the Criminal Procedure Act (Du Toit)/Chapter 28 Sentence (ss 274299A)

[20] In *S v Brophy & another*⁸ a full bench concluded that the trial court in imposing sentence had overlooked entirely the period of time spent in prison by both accused while awaiting trial and sentence . This oversight entitled the full bench to interfere with the sentence and to consider sentence afresh. Schwartzman J referred to *S v Vilakazi (supra)* where Goldstein J said (at 148e) that he '*would be loathe in the absence of clear evidence to decide that the miseries of the awaiting trial period are more oppressive than those of the post sentence one's.*'

[21] In *S v Radebe & Another*⁹, the Supreme Court of Appeal remarked as follows:

"[14] A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one."

[22] These authorities are distinguishable from the facts of this case. The trial court did consider the period that the appellant was in custody awaiting trial. That is dealt with expressly in the court's judgment. In the decisions referred to above, the courts on appeal found that the trial courts erred by not considering that

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⁸ 2007 (2) SACR 56 (W).

⁹ 2013 (2) SACR 165 (SCA) at para 14.

period, hence they were at large to interfere with the various sentences. That is not the case herein. The trial court caused the two sentences to run concurrently and that, too, was a consideration in favour of the appellant. In my view, where there is no misdirection found in the sentence imposed, the appeal should fail.

[23] I accordingly make the following Order:

“The appeal is dismissed”

T.V NORMAN

JUDGE OF THE HIGH COURT

I agree.

V.NONCEMBU

JUDGE OF THE HIGH COURT

Appearances:

For the APPELLANT : ADV. D.P GELDENHUYS

JUSTICE CENTRE

MAKHANDA

For the RESPONDENT : ADV. D. GOVENDER

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTIONS

MAKHANDA

DATE OF HEARING : 12 OCTOBER 2022

DATE OF JUDGMENT : 18 OCTOBER 2022